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VIA ECF

David J. Smith
Clerk of Court
United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *Samsung Electronics America, Inc. v. NLRB* – Case No. 16-10788-FF

Dear Mr. Smith:

Petitioner-Cross Respondent Samsung Electronics America, Inc. ("Samsung") respectfully submits this letter brief in accordance with the Court's Order of May 23, 2018, directing that counsel file separate letter briefs regarding the effect of the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, No. 16-285, 2018 WL 2292444 (May 21, 2018) (attached as Exhibit A).

(1) *Epic Systems* Entitles Samsung to Contract for and Enforce Its Class-Arbitration Waiver.

The *Epic Systems* decision directly addresses the National Labor Relations Board's ("NLRB" or "Board") argument that Samsung's mutual arbitration agreements and the collective or class action waivers included therein are unenforceable because they violate the National Labor Relations Act ("NLRA").

The Supreme Court in *Epic Systems* considered and rejected this same argument in holding that the Federal Arbitration Act ("FAA") requires courts to "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings"—and

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that the NLRA neither "offers a conflicting command" nor invalidates class action waivers contained in arbitration agreements. Ex. A at *3, *5-8.[1]

The Supreme Court's decision in *Epic Systems* reaffirms key principles underlying its prior decisions enforcing arbitration agreements with class action waivers, including that Congress "specifically directed [courts] to respect and enforce the parties' chosen arbitration procedures" and that the FAA "requires courts 'rigorously' to 'enforce arbitration agreements according to their terms, including terms that specify… *the rules* under which that arbitration will be conducted." *Id.* at *5-6 (emphasis in the original). As the parties in *Epic Systems* "contracted for arbitration" and specified that arbitration would use "individualized rather than class or collective action procedures," the FAA "seems to protect [that agreement] pretty absolutely." *Id.*

The employees in *Epic Systems* also challenged the class action waivers in their arbitration agreements based on the FAA's saving clause, arguing that the NLRA rendered their arbitration agreements "illegal," and that such illegality was grounds for revocation of the arbitration agreements under the FAA's saving clause. In rejecting this argument, the Supreme Court observed that NLRA "Section 7 focuses on the right to organize unions and bargain collectively … [and] does not express approval or disapproval of arbitration[,] does not mention class or collective action procedures[, and] does not even hint at a wish to displace the [FAA]—let alone accomplish that much clearly and manifestly, as our precedents demand." *Id.* at *9.

The Supreme Court also observed that "[n]othing in our cases indicates that the NLRA guarantees class and collective action procedures." *Id.* at *12. The Court ruled that the "saving clause does not save defenses that target arbitration …, such as by interfering with fundamental attributes of arbitration," and that, "by attacking (only) the individualized nature of arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes." *Id.* at *6. In doing so, the Court applied the rationale it set forth in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and held that "an argument that a contract is unenforceable *just because it requires bilateral arbitration* … impermissibly disfavors arbitration." Ex. A at *7-8 (emphasis in original). Accordingly, the Supreme Court concluded that the FAA requires the enforcement of arbitration agreements according to their terms, including any class action waivers included therein. *Id.*

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[1] The Supreme Court's decision also affirmed the Fifth Circuit's decision in *Murphy Oil USA, Inc. v. National Labor Relations Board*, 808 F.3d 1013 (5th Cir. 2013), and upheld the Second Circuit's decisions in *Patterson v. Raymours Furniture Co., Inc.*, 659 F. App'x 40, 43-44 (2d Cir. 2016) and *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013), in which the Second Circuit considered and rejected the argument that the challenged arbitration agreements and class action waivers in these cases were unenforceable because they violated the NLRA.

Here, the NLRB argued that Samsung's mutual arbitration agreements and the collective and class action waivers included therein are illegal and unenforceable because they violate the NLRA. The Supreme Court in *Epic Systems* rejected that precise argument and held that courts must "enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." *Id.* at *3. As Samsung's mutual arbitration agreement provides, *inter alia*, an explicit waiver of all collective or class actions, in litigation or arbitration, requiring any arbitration to proceed individually, that waiver is enforceable.

(2) *Epic Systems* Establishes that the NLRB Erred in Finding Sanchez's Communications to Be "Coercive Interrogations."

The Board found that Samsung human resources officer Sandra Sanchez's September and October 2014 communications with Franks "were coercive and would reasonably attempt to interfere" with Franks's protected NLRA Section 7 right to collective arbitration, and were "in reality . . . thinly disguised question[s] aimed at discovering the extent" to which Franks intended to engage in the (purported) right to collective arbitration. *Samsung Elecs. Am., Inc.*, 363 NLRB No. 105, at 3 (Feb. 3, 2016). This finding presupposed that Franks enjoyed such a right in the first place. Because the Supreme Court determined in *Epic Systems* that Section 7 contains no such right, Sanchez's communication necessarily did not interfere with any right protected by Section 7, and, therefore, did not violate Section 8(a)(1) of the NLRA.

Alternatively, if the Court does not find that it necessarily follows from *Epic Systems* that Sanchez did not interfere with Franks's Section 7 rights, the Court should presume that a human resources professional who looks into an employee grievance that might give rise to a lawsuit is attempting to resolve the underlying grievance, not just to gather intelligence on the lawsuit. Br. of Pet'r Samsung Elecs. Am., Inc. at 53 (June 9, 2016); *see also* Second Br. of Pet'r-Cross-Resp't Samsung Elecs. Am., Inc. at 31 (Sept. 12, 2016). This approach comports with common sense: attempting to solve employee problems both averts suits before they start and leads to sound labor relations. Br. of Pet'r Samsung Elecs. Am., Inc. at 53. The Board unreasonably concluded otherwise when it characterized Sanchez's inquiries as coercive interrogations. *Id.* at 53-54.

CONCLUSION

Now that the Supreme Court has resolved the collective and class action waiver issue, this Court is in a position to, and should, grant Samsung's petition for review.

Respectfully submitted,

/s/ Mark E. Zelek
Mark E. Zelek

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cc: All counsel of record (via ECF)